In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-16

HAYES INTERNATIONAL CORPORATION, PETITIONER

v.

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that the award of a contract to one of its competitors violated public policy and applicable regulations governing conflicts of interest in government procurement contracts.

During the early 1950's, the Boeing Company sold seven hundred thirty-two KC-135 aircraft to the United States Air Force (Pet. App. B, p. 35a) and entered into "sustaining engineering" contracts under which Boeing agreed to recommend specific modifications and improvements in the aircraft that would keep them technologically current and remedy any problems in their performance. Since it is customary to award such "sustaining engineering"

contracts to the manufacturer, the Air Force did not request open bidding for them (Pet. App. A, pp. 6a-7a).[1]

In 1968, the Secretary of the Air Force issued a request for proposals on a so-called "IRAN/MOD" contract[2] to implement certain recommended modifications and improvements in the KC-135 aircraft. The Air Force received five proposals in response to the request, including one by petitioner and one by Boeing (Pet. App. B, p. 36a). Petitioner did not object to Boeing's participation in the bidding (Tr. 175).[3] Since petitioner's bid was the lowest, the contract was awarded to it (*ibid.*).

When that contract expired, the Secretary on March 29, 1971, issued a request for proposals on another "IRAN/MOD" contract (Pet. App. B, p. 36a).[4] Three proposals were received, including one by petitioner and one by Boeing (*ibid.*). Since Boeing's bid was the lowest, the contract was awarded to it (*ibid.*). Once again, petitioner did not object to Boeing's participation in the bidding. Nor did petitioner object when the contract was awarded to Boeing (*id.* at

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[1]The Air Force is not capable of performing the engineering service itself because it lacks adequate personnel and access to continuing information on the performance of 707 commercial jet aircraft (from which the KC-135 was developed), both of which Boeing possesses (Tr. 342-343).

[2]"IRAN/MOD" is an acronym for inspect and repair as necessary/modification. An "IRAN/MOD" contract requires the contractor to (1) periodically inspect each aircraft, (2) perform modifications as ordered by the Air Force, and (3) repair defects discovered in a particular aircraft as a result of the contractor's inspection (Pet. App. A, pp. 4a, 5a-6a).

[3]"Tr." refers to the transcript of the proceedings in the district court.

[4]After issuance of the request, a pre-proposal conference was conducted by the Air Force to respond to questions about the request (Tr. 311). This conference was attended by representatives of several companies, including petitioner and Boeing (Tr. 312). Petitioner did not object to Boeing's participation (Tr. 175).

38a). Had it then lodged a formal complaint, the contracting officer would have been required, under his review authority, to render a final decision that would have been subject to review by an Assistant Secretary of the Air Force (*ibid.*).[5]

On September 13, 1971, petitioner filed a complaint seeking a permanent injunction or, in the alternative, a declaratory judgment setting aside the award of the "IRAN/MOD" contract to Boeing, on the ground, *inter alia*, that the award of the contract to Boeing violated Defense Department regulations prohibiting organizational conflicts of interest (Pet. 5). The district court granted a preliminary injunction, but the court of appeals granted the Secretary's motion for a stay pending appeal (Pet. App. A, pp. 3a-4a).[6]

After a non-jury trial, the district court determined that the award of the contract to Boeing did not result in an illegal conflict of interest and therefore denied the relief sought (Pet. App. B, p. 40a). The court of appeals affirmed, reasoning that the award of the contract violated neither public policy nor Defense Department regulations prohibiting organizational conflicts of interest (Pet. App. A, p. 30a).

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[5]On July 15, 1971, after petitioner became aware of a newspaper article that stated that the ultimate value of the contract would be higher than petitioner had anticipated, petitioner made inquiries and expressed objections to various government officials concerning the award of the contract to Boeing (Pet. App. B, p. 34a).

[6]Petitioner subsequently moved to vacate the preliminary injunction in the district court on the ground that the contract was scheduled to extend up to five years and that it was in the best interests of all the parties to proceed expeditiously to a judgment on the merits (Pet. App. A, p. 4a).

1. Petitioner contends (Pet. 15-20) that the award of the "IRAN/MOD" contract to Boeing violated Defense Department regulations governing conflicts of interest in government procurement contracts (32 C.F.R. 1.113-2 and Part 141 (1971); Pet. App. C, pp. 41a-51a). But the organizational conflict of interest regulations apply only when a clause has been placed in a prior contract which bars or limits the right of the contracting party to compete for subsequent contracts. 32 C.F.R. 1.113-2(c). No such clause was included in Boeing's sustaining engineering contract with the Air Force (Tr. 180-181, 239-240). Accordingly, petitioner errs in contending that those regulations apply here at all. In any event, the regulations by their express terms do not forbid the award of an "IRAN/MOD" contract to the holder of a "sustaining engineering" contract.

The court of appeals correctly held that the Air Force's administrative interpretation of its regulations so as to permit the award of the "IRAN/MOD" contract to Boeing is consistent with the purpose of those regulations (Pet. App. A, pp. 25a-30a). That purpose is to avoid the possibility that the contractor who does the research and development work on a new technological system would design it so that no other contractor would be capable of producing it (Pet. App. C, p. 47a; Pet App. A, pp. 26a-29a). Boeing's contract here does not create the possibility of exclusive dealing that the conflict of interest regulations were intended to avoid.[7]

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[7]In any event, we submit that petitioner's failure timely to object to Boeing's submission of a proposal barred it from subsequent relief. "[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

2. Petitioner also contends (Pet. 9-14) that the award of the "IRAN/MOD" contract to Boeing was void as contrary to general public policy against conflicts of interest in government procurement contracts. As the court of appeals noted (Pet. App. A, p. 30a), however, a federal court has no power to set aside a contract merely because it believes that the contract would result in an undesirable procurement policy. No federal statute or regulation expresses a "general public policy" against all forms of potential conflicts of interest, nor is there any judicial precedent for such a broad policy.[8]

Moreoever, we submit that, contrary to the conclusion of the district court and the court of appeals, petitioner lacks standing to make this contention. The procurement regulations at issue were promulgated for the sole benefit of the government to prevent a contractor charged with the task of designing a product for the government from influencing subsequent contracts for production and development. See Pasley, *Organizational Conflicts of Interests in Government Contracts*, 1967 Wis. L. Rev. 5, 6-7. They consequently may be waived if it is in the government's interest to do so (Pet. App. A, pp. 22a-23a). Hence, petitioner does not possess a legal interest which entitles it to seek judicial relief. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Nor does petitioner have standing to contend that the award of the contract to Boeing is void as contrary to an alleged "public policy," since petitioner is in no different position from that of any other member of the public with regard to this claim. See, *e.g.*, *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208; *United States* v. *Richardson*, 418 U.S. 166.

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[8]The cases upon which petitioner relies are inapposite. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, involved a contract that was found to be in violation of the conflict-of-interest statute, 18 U.S.C. 434 (subsequently repealed). *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138, involved a contract that was found to be in violation of the Anti-Kickback Act, 41 U.S.C. 51.

In any event, the award of the "IRAN/MOD" contract to Boeing does not pose a significant risk of unfair self-dealing.[9] The district court found that Boeing constitutes only one among several sources of recommendations for improvements in the KC-135 aircraft (Pet. App. B, p. 37a). Moreover, modifications suggested by Boeing are subject to rigorous examination by the Air Force prior to being adopted (*ibid.*). The fact that under the "IRAN/MOD" contract Boeing may be implementing some of its own recommendations does not therefore create any substantial possibility that Boeing's work will be increased as a result of improper recommendations for modification.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[9]There is no reason to suppose that the sustaining engineering contract gives Boeing an unfair competitive advantage in bidding on the "IRAN/MOD" contract. Petitioner was awarded the first "IRAN/MOD" contract, despite the fact that Boeing had a sustaining engineering contract with the Air Force at that time (Pet. App. B, pp. 34a-35a). Similarly, as the court of appeals found (Pet. App. A, p. 11a), other manufacturers who possess sustaining engineering contracts with respect to aircraft that they manufactured have submitted "IRAN/MOD" proposals that have been rejected.